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In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, deceased, *Petitioner*,

vs.

THE UNION PACIFIC RAILROAD COMPANY, *Respondent*.

RESPONDENT'S PETITION FOR REHEARING.

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PRELIMINARY STATEMENT.

The decision of the Court in this case, respecting the liability of respondent on the cause of action asserted by petitioner as to Ellanore Andlauer, deceased, is of far reaching importance to every railroad in the United States. It also vitally affects other parties in all cases where there may be involved questions decided by the Court in the case at bar. In its opinion this Court has disapproved decisions of long standing in the Eighth and other Circuit Courts of Appeal and has completely re-

nounced rules of law announced in such decisions regarding the duty of a guest or passenger in an automobile to warn the driver thereof of impending danger.

The ruling of the Court in this case is such that well recognized and long followed rules of law respecting the character of evidence necessary to sustain defendant's burden of proof of contributary negligence have been abrogated. Under the Court's ruling, a court in a case by a guest where all of the occupants of an automobile may have been killed would be powerless to take the case from the jury, even though the circumstances and physical facts may, under established principles, clearly convict the decedents of contributory negligence as a matter of law. The holding is such that the only showing required to tender a jury issue in actions for death of an automobile guest is proof of the accident, existence of primary negligence, and the death of the guest. Regardless of physical facts and circumstances which might be shown in such a case, this Court has held that the issue thus presented cannot be dealt with by a court, but only by a jury.

The Court's premise for its holding is that it is impossible for a court to lay down rules of conduct for a guest in such cases. Thus, this Court imposes upon railroads a burden more onerous than that imposed upon defendants in *res ipsa loquitur* cases, as in such cases, when facts appear, even though they be physical facts, which exonerate the defendant from negligence, the court is authorized to take the case from the jury. Under the holding of this Court, a jury submission would be required.

The decision of the Court is based upon the premise that respondent was guilty of primary negligence in operating the train at a negligent rate of speed and in

failing to warn. We will demonstrate that respondent was not negligent in either respect, and as a result Ellanore Andlauer's death was caused solely by her husband's negligence.

Modern transportation demands require the rendition of speedy and efficient transportation services. The Court is not dealing here with an operation in a thickly populated or congested area, but with a train being run over a flat, open country sparsely inhabited. In the light of that requirement and common knowledge that railroad trains do operate at high speeds, we believe the decision of the Court in this case, in holding that respondent is guilty of primary negligence in operating the train in question over a private crossing at a rate of speed of fifty to sixty miles per hour, not in violation of any statute, ordinance, regulation, custom or rule of the common law, overturns existing law announced by many courts in many cases and, for that reason, the decision in this case is of such vital concern to railroads in America that a reconsideration of the question in the light of the facts as shown by the record should be given.

The importance and revolutionary effect of the Court's decision must be conceded. Because of the vital concern of all the railroads operating in America with the decision of the question presented to the Court, this petition is respectfully filed with the hope that the Court will reconsider the case on a rehearing and permit reargument of the important questions involved.

PETITION FOR REHEARING.

Comes now respondent and prays the Court to vacate and set aside its opinion and judgment and grant it a rehearing of this cause upon the following grounds and for the following reasons, to-wit:

I.

Respondent does not stand convicted of primary negligence in operating its train at an excessive rate of speed, because:

(a) The petition does not charge violation of the speed ordinance of the city of St. Marys, Kansas, as the result of which the operation of the train in question beyond the city limits at a rate of speed in excess of that prescribed by said ordinance is not an issue tendered by the pleadings;

(b) The accident occurred beyond the borders of the town of St. Marys, where the ordinance will not be given extraterritorial effect, from which it follows that respondent cannot be convicted of primary negligence for operating a train at the crossing in question at a rate of speed in excess of that fixed by said ordinance;

(c) There is no evidence in the record to show that either of the Andlauers had knowledge of any alleged custom of respondent to reduce the speed of its trains at the crossing in question;

(d) There is no statute or rule of common law in Kansas limiting the speed of trains over such crossing;

(e) It is a matter of common knowledge that railroads in order to render adequate transportation services must operate their trains at high speed and the operation of the train at the rate of speed here shown is not negligence as a matter of law.

Primary negligence must be predicated either upon a negligent rate of speed or failure to warn. In this division of the argument we will respectfully demonstrate that the Court's conclusion that respondent was guilty of operating the train in question at a negligent rate of speed is not well founded either upon the record or upon well established principles of law heretofore de-

clared by the courts. From the Court's accurate description of the crossing in question it appears that decedents' view of the railroad track and approaching train was unobstructed for at least 2,000 feet. The train was traveling through the flat, open country of Kansas, in broad daylight, on a clear day. There was only one track at the place of the accident. It is shown by the record that there were no other travelers or persons upon or near this crossing at the time of the accident, except the witness' Nagle, who was in a car approximately 400 feet behind the Andlauers. In fact, it was no different from any of the many other crossings in the rural sections of the state. The place of the accident was far removed from congested areas, even the city of St. Marys being only a small town having between 1,130 and 1,500 inhabitants (R. 53, 58). In order that respondent may render adequate transportation service upon the transcontinental railroad in question, it is necessary that operations be conducted at high rates of speed, and the inhabitants of the country are charged with knowledge of such practice. We will attempt to show that the Court's conclusion that the train was being operated at a negligent rate of speed at the time and place in question is not well founded. Each of the arguments in support of our contention will be separately stated and argued in this division. The alleged failure to warn is separately treated in other divisions of this petition.

(a) The petition does not charge violation of the speed ordinance of the city of St. Marys, Kansas, as the result of which the operation of the train in question beyond the city limits at a rate of speed in excess of that prescribed by said ordinance is not an issue tendered by the pleadings.

When the speed ordinance of the city of St. Marys was offered in evidence, respondent objected to its introduction upon the ground that it was not pleaded and not competent for any purpose (R. 60). The amended petition on which the case was tried pleads negligence in the operation of the train at an excessive rate of speed (R. 9) and in the violation of a custom to slow down its train when passing the college (R. 10). It does not plead violation of the ordinance introduced in evidence; nor does it plead that the speed of the train was excessive because it violated the provisions of the ordinance. In this state of the record no issue was properly tendered by the pleadings as to whether or not the violation of the city ordinance constituted negligence. Therefore, under no conceivable theory, could the rates of speed fixed by the ordinance be used for determining whether the rate of speed at which the train was operating was negligent. The petition does not attempt to charge that the operation of the train at a speed of from fifty to sixty miles per hour at the crossing was negligent because of the existence of the ordinance and the duty of the engineer to slow down his train to such a speed that he would not exceed the limits prescribed by such ordinance upon entering the town. On the other hand, petitioner founded his charge of a negligent rate of speed upon the alleged operation of the train at a speed which he asserts is negligent in the light of common law rules and upon an alleged custom of respondent to slow down its trains at the crossing. The fact that the court admitted the

ordinance in evidence does not render that ordinance competent upon the issue here involved, because the manifest error of the trial court in admitting the ordinance could not be complained of in this proceeding at any time until this Court had handed down its decision.

We therefore respectfully submit that, in determining the question of the negligent operation of the train, it is not proper to extend the scope of the inquiry beyond the issues framed by the pleadings.

(b) The accident occurred beyond the borders of the town of St. Marys, where the ordinance will not be given extraterritorial effect, from which it follows that respondent cannot be convicted of primary negligence for operating a train at the crossing in question at a rate of speed in excess of that fixed by said ordinance.

The ordinance had no extraterritorial force. No power was vested in the city of St. Marys to control the acts of respondent committed beyond the territorial limits of that city. Petitioner's decedents could acquire no rights under that ordinance. Respondent owed them no duty under it. The record here shows, without dispute, that the place where the accident occurred is beyond the corporate limits of the town of St. Marys. Such being the case, it should be ruled here, as was held in *Illinois Central Railway Co.* v. *Davis,* (C. C. A. 6th) 32 Fed. (2d) 232, that municipal regulations intended to fix a standard of duty for railroad companies in operating trains have for their purpose only the protection of those within the municipality and not those outside of it. Therefore the operation of a train outside of the city at a speed in excess of the rates fixed by an ordinance, does not constitute negligence though it occur near a city.

In the Davis case, plaintiff's decedent was killed at a public crossing by a train approaching but just beyond

the corporate limits of the town of Trimble in the state of Tennessee. The statutes of Tennessee required such trains to give signals "at short intervals" while within one mile of such town and until they reached its station. Concerning the effect of this statute and its applicability to the case there being considered, the Court held (l. c. 233):

> "The provision was intended to fix a standard of duty for railroad companies in operating trains *in cities.* * * * The purpose, as we have said, of this provision of the statute * * * was *to protect those within the city and not those outside it.* Even, therefore, if there was a failure to comply with this statute *there was on that account no violation of duty to the decedent.* The liability *as to him* was determinable under the law applicable to the crossing where the accident occurred—the common law." (Italics ours.)

We therefore respectfully submit that respondent's operation of its train over the crossing in question at a speed in excess of that prescribed by the ordinance of the town of St. Marys is of no significance in determining whether such rate of speed was negligent, as the ordinance had no application beyond the territorial limits of the town, and therefore respondent's duty as to the speed of the train must be determined by application of law applicable to the crossing in question and not by the ordinance.

(c) There is no evidence in the record to show that either of the Andlauers had knowledge of any alleged custom of respondent to reduce the speed of its trains at the crossing in question.

The amended petition pleads that respondent negligently omitted to observe and follow a custom to slow down its trains when passing the college (R. 10). The only evidence offered by the petitioner in support of that allegation of the petition was the testimony of the witness Nagle. Over objection he testified (R. 55) that he had "at times" observed this train as it approached the crossing, and that "it usually slowed up" to about 25 or 30 miles an hour. The objection interposed was that this testimony was not competent because it was not shown that decedents had any knowledge of the alleged custom.

There is no evidence that Ellanore Andlauer had ever ridden the train in question or that she ever saw that or any other train approaching this crossing prior to the day of the accident. As to Ellanore Andlauer, there is a total failure of proof of knowledge of or reliance upon any custom to reduce the speed of the train at this crossing.

As to Marcus Andlauer, the witness William H. Miller testified that prior to 1927 Marcus Andlauer had been accustomed to use the train on his trips to St. Marys; that he bought an automobile in July of 1927, and after that purchase he had not used the train "so much" (R. 55).

The witness testified on cross-examination that he could only recall one specific instance where he had taken Marcus Andlauer to catch the train involved in this accident (R. 55). There is no evidence that any train ever ridden by Marcus Andlauer ever slowed down at the crossing.

In our view, the record as thus outlined cannot be said to prove knowledge of and reliance by decedents upon the custom. There is no evidence in the record showing that either of the Andlauers had ever heard of the speed ordinance of St. Marys. We, therefore, submit that there is no evidence of any knowledge by decedents of a custom of respondent to reduce the speed of the train in question.

If the alleged custom existed, there is no evidence to show knowledge of that custom by decedents or their reliance upon it. The law is well settled that before negligence can be based upon the violation of a custom, the party injured must have known of and relied upon that custom. Therefore, the alleged failure to reduce the speed of the train in accordance with the averred custom cannot be the basis of liability.

(d) There is no statute or rule of common law in Kansas limiting the speed of trains over such crossing.

There is no statute or court decision in the State of Kansas limiting the speed of trains over highway crossings.

The Supreme Court of Kansas in the case of *A. T. & S. F. Ry. Co.* v. *Schriver*, 80 Kan. 540, 103 Pac. 994, has defined the rights of railroad companies respecting the speed at which they may operate their trains over railroad crossings in the following language, l. c. 995:

> "It is now generally understood that an unusually high rate of speed is not of itself improper or negligent. In the open country, where no peculiar conditions exist which make it dangerous, and speed is not limited by statute, trains may be operated at any speed which the existing exigencies of public traffic seem to require. *A. T. & S. F. Co.* v. *Hague*, 54 Kan. 284, 38 Pac. 257."

This ruling was afterwards approved by the Supreme Court of Kansas in *Land* v. *St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612, l. c. 614.

Therefore, liability in this case may not be predicated upon the fact that this train was operated over this crossing at a rate of speed negligent at common law or by statute.

(e) It is a matter of common knowledge that railroads in order to render adequate transportation services must operate their trains at high speed and the operation of the train at the rate of speed here shown is not negligence as a matter of law.

Modern transportation demands require rapid operation of trains. By reason of airplane and other competition, the demands of the public are for faster schedules than those now maintained by most railroads. Railroads are required to maintain schedules. If they are required to reduce the speed of their trains at every railroad crossing, schedules cannot be maintained. Travelers upon the highway well understand that they must stop for the train and not the train stop for them (*Balt. & Ohio* v. *Goodman*, 275 U. S. 66, 69). They do not expect the speed of the trains to be reduced merely because the railroad track intersects the highway.

It is common knowledge that the usual speed of transcontinental passenger trains, such as the one in question, is 60 miles per hour and more. The operation of the train in question at a speed of from 55 to 60 miles per hour through a flat, open Kansas prairie in broad daylight on a clear day, far removed from congested areas, cannot be said to be excessive. See *A. T. & S. F. Ry. Co.* v. *Schriver, supra.*

Judge Augustus N. Hand, speaking for the second circuit in the case of *Bassett* v. *Delaware & Hudson Co.*,

62 F. (2d) 74, 75, upon the question of whether or not the operation of a train over a crossing in the open country, but near a village, at a speed estimated to have been between 50 and 60 miles an hour was negligence, said (l. c. 75-76):

> "We think that the plaintiff *made no case based upon a negligent rate of speed of the train,* as it approached the crossing. There was no speed limit required by the laws of Vermont. The crossing was *beyond the confines* of the village of Fair Haven at a place where the view of the railroad track was unobstructed for a long distance and there were no circumstances which rendered the crossing peculiarly dangerous. Slowing down at such country crossings would make it impossible for railroads to maintain their time schedules and *has never been regarded as necessary.* Travelers must rely for security on their own vigilance and the sounding by the railroads of the signals required by law. They cannot require more protection. *Baltimore & Ohio R. Co.* v. *Reeves,* (C. C. A. 6) 10 F. (2d) 329; *Pennsylvania R. Co.* v. *Stegaman,* (C. C. A. 6) 22 F. (2d) 69; *Southern Pac. Co.* v. *Stephens,* (C. C. A. 9), 24 F. (2d) 182; *Strider* v. *Penn. R. R. Co.,* (C. C. A.) 60 F. (2d) 237; *Warner* v. *N. Y. Cent. R. R. Co.,* 44 N. Y. 465; *Mulvaney* v. *N. Y. Cent. R. Co.,* 233 Mich. 350, 206 N. W. 536; *Newhard* v. *P. R. R. Co.,* 153 Pa. 417, 26 A. 105, 19 L. R. A. 563; *Haller* v. *Penn. R. Co.,* 306 Pa. 98, 159 A. 10; *Henry* v. *Boston & Maine R. R.,* 125 Me. 366, 134 A. 193. In *Canadian Pacific Ry. Co.* v. *Slayton,* 29 F. (2d) 687, we held that the jury might find the rate of speed at a crossing negligent, but the place of collision was in a village." (Italics ours.)

Judge Hand also said at l. c. 76:

> "A speed of from 50 to 60 miles an hour at an ordinary crossing has not been held excessive. Moreover, even if we assume that there was some evidence of such a rate, it certainly was disputed and the defendant was entitled to the charge which it requested: 'That a rate of speed of even 40 to 50 miles over the crossing in question would not be any negligence.' The denial of this request was error."

Many of the facts in that case closely parallel the facts in the case at bar. There as here the train was proceeding through the open country at a speed estimated to have been between 50 and 60 miles per hour toward a highway crossing not "peculiarly dangerous." In that case as in this the train was approaching the village. In that case as in this the crossing was beyond the confines of, but near, the village. The opinion in the Bassett case does not state the population of the village there mentioned, but the town of St. Marys, Kansas, is no more than a village, containing a population of from eleven hundred thirty to fifteen hundred inhabitants.

The similarity of the facts in that case to the facts of this case bearing upon the question of excessive speed, render that case exactly in point. We, therefore, submit that the operation of the train over the crossing in question in the open country at a speed of from 50 to 60 miles per hour as required by the exigencies of service demands was not negligent as a matter of law, and there is no evidence in this record of the negligent operation of the train at excessive speed.

Primary negligence based upon excessive speed is not shown by the record in this case. On the contrary, the record shows that the speed at which the train was operated was, as a matter of law, not negligent. The opinion of the Court is based upon the premise that there was negligent speed, the opinion reciting (p. 5): "The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual." The Court then states that the negligence of the driver of the automobile was concurrent with the negligence of respondent in operating the train at a negligent speed or in failing to warn. We have shown that primary negligence cannot be based on speed, and will show that no proper predicate for negligence can be based on failure to warn. Therefore primary negligence of respondent is completely eliminated and it must be conceded that the sole proximate cause of the accident was the negligence of Marcus Andlauer and therefore there can be no liability on respondent.

It thus is apparent that the Court, in reaching the conclusion that the contributory negligence of the husband was not the sole proximate cause of the accident, treated the case as though negligence on the part of respondent in operating its train at excessive speed had been established and that therefore its negligence was concurrent with that of the husband.

If the Court upon re-examination of the record determines, as we think it must, that there is no evidence of excessive speed of the train, then affirmance of the judgment of the Circuit Court as to both decedents will follow.

II.

If it be assumed that Ellanore Andlauer warned her husband, then her death was occasioned solely by his negligence and not respondent's failure to warn.

We have already shown that the record affords no support for petitioner's claim of excessive speed as primary negligence. Thus, there remains for consideration only the question of whether or not failure to warn was a proximate or a concurrent cause of the death of the wife. Under this head we deal with that question upon the assumption that the wife did note the danger, warn her husband and urge him to stop.

It is a familiar principle of law that he who has knowledge of a fact cannot be injured by the failure of others to notify him of that fact. If it be assumed that the wife did, in fact, warn her husband at an effective point, then whistling for the crossing would not have further apprised him of the train's approach. The warning given by the wife fully informed him of the approach of the train.

In *Southern Pacific Co.* v. *Kauffman*, 50 F. (2d) 159, l. c. 166 (C. C. A. 9), the Court in a guest case said:

> "If the driver of the automobile saw the approaching train in time to stop, any negligence of the railway company in failing to give notice of the approach of the train would no longer be an operating cause for the injury."

Under these assumptions, respondent's failure to warn had nothing whatever to do with the collision, which was brought about solely by the husband's negligence in driving into the path of a train which he knew, from his wife's warning, was approaching. Respondent's

failure to sound its whistle was "no longer an operating cause for the injury."

Since, therefore, respondent's failure to warn was not the proximate cause and had nothing to do with bringing about the result, it cannot be said that failure to warn was a contributing cause or concurrent with the negligence of the husband.

III.

If it be assumed that the wife with knowledge of the train's approach remained silent upon the theory of reliance upon her husband to exercise ordinary care or the theory that her interference might disconcert him, then respondent's failure to warn was neither the proximate nor concurrent cause of the accident.

We deal now with the assumption that the wife, although knowing of the train's approach, remained silent, either in reliance upon her knowledge of the habits and character of her husband, trusting him to exercise ordinary care for her safety, or because she thought that her interference might disconcert him.

The Court says in its opinion that:

> "Whatever duty rested upon her (the wife) under the circumstances for aught that appears to the contrary may have been fully discharged. It properly cannot be said from anything shown by the record before us that she did not maintain a careful lookout for the train or that, if aware of its approach, she did not warn her husband or urge him to stop before entering upon the crossing. * * *"

If the Court is correct in this statement, then it is plain that the failure to sound the whistle did not

constitute the proximate cause because the whistle could have added nothing to the knowledge which each of the Andlauers possessed. The Court further says:

> "Or she may have seen the approaching train, observed that her husband was also aware of the fact and relying upon her knowledge of his habits and character trusted him with good reason until it became too late to interfere to do whatever was necessary to avoid the danger."

If this was the situation, then the sounding of the whistle could have added nothing to the knowledge they already possessed and the failure to so sound the whistle did not constitute actionable negligence.

It is plain that the accident was caused by the unfortunate error of judgment of the husband in attempting to cross the track in front of the train which both he and his wife could easily discern when they were in a place of safety and the train was approaching at a high rate of speed.

It is not apparent to us from the facts shown by the record how the wife could disconcert her husband by telling him that the train was coming. There is no more reason why this should disconcert him any more than the sounding of a whistle or the approach of the train. It was not a case where they were suddenly confronted with the train, for the train was in full view when they were 71 feet from the crossing, driving slightly upgrade and at such a rate of speed that the car could have been stopped almost instantly. Drivers of automobiles are often confronted with obstacles or dangers much more disconcerting than the situation presented by the record in this case.

Clearly, the failure to sound the whistle under the facts disclosed by the record of this case is not actionable. Ellanore Andlauer's death was caused solely by the negligence of Marcus Andlauer without any concurrent negligence of the respondent.

Conclusion.

The opinion of the Court in this case was founded upon the assumption that respondent was guilty of primary negligence in operating the train at a negligent rate of speed, or in negligently failing to give warning of its approach, or both. We have pointed out that the record gives no foundation for this assumption. In fact, a consideration of the record in this case leads us to no other conclusion than that the respondent was not guilty of primary negligence having any causal connection with the accident. In the absence of such primary negligence it makes no difference whether Ellanore Andlauer warned her husband of the approach of the train and urged him to stop the automobile or whether she remained silent thinking that the warning would be needless or fearing that it might disconcert him. In either state of facts, the sole cause of the accident was the negligence of Marcus Andlauer in driving the automobile into the path of the approaching train for which respondent cannot be held in any way accountable or responsible.

By reason of the great importance of the principles laid down by the Court in this case and their effect upon existing rules of law, and because of the assumption made by the Court respecting the negligence of respondent, we respectfully request that the Court set aside its opinion and decision, grant the respondent a

rehearing, and upon rehearing affirm the judgment of the Circuit Court of Appeals.

Respectfully submitted,

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Certificate of Counsel.

NOW COME C. A. Magaw, I. N. Watson, Henry N. Ess, Paul V. Barnett and Charles V. Garnett, counsel for the respondent in the above entitled cause, and certify that they and each of them have read and examined the foregoing petition for rehearing and know the contents thereof; that said petition for rehearing is presented to the Court on behalf of respondent in good faith and not for delay.

C. A. MAGAW,
I. N. WATSON,
HENRY N. ESS,
PAUL V. BARNETT,
CHARLES V. GARNETT.